



IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 78-388

TEX-LA ELECTRIC COOPERATIVE, INC., and
SAM RAYBURN DAM ELECTRIC COOPERATIVE, INC.,
Petitioners,

v.

CECIL D. ANDRUS, Individually, and as Secretary of the
Interior, ET AL., *Respondents.*

REPLY BRIEF FOR PETITIONERS

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December 27, 1978

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REPLY BRIEF FOR PETITIONERS

INTRODUCTION

Although captioned a "Reply Brief," this document does not present additional argument concerning the issues in the present case. It instead identifies certain misstatements of fact which appear in Respondent's brief in opposition. Petitioners had intended to identify these misstatements of fact in a letter to the Court, but were advised by the clerk's office that such a letter would not be distributed to the Court with the briefs. Petitioners were further advised that the only way to assure consideration by the Court of a communication concerning these misstatements of fact is to designate the communication a "reply brief." Accordingly, Petitioners submit herewith their reply

brief, in which they respectfully ask the Court's attention to the following:

I. RE ISSUES RAISED IN THE LOWER COURTS

At page 11 of their brief in opposition, Respondents make the following statement:

"Petitioners contend that the agency improperly included, as part of the operations charges to be recovered by the rate increase, expenses designed for recreation and wildlife activities associated with one of the two dam projects (Pet. 13). We agree with petitioners that Section 5 does not authorize the recovery of non-power costs from hydroelectric power customers. This specific objection was not, however, urged by petitioners in opposition to the entry of summary judgment in the district court or in the court of appeals, and it is thus not properly presented for review in this Court."

And again, at page 12 of their brief, Respondents say:

"Petitioners' failure to raise this specific claim in the courts below prevents the determination of this essentially factual issue on this record."

Contrary to Respondents' allegations, Petitioners raised the "specific objection" in every brief filed in the court of appeals and at oral argument. At page 46 of their initial brief, Petitioners said:

"The inclusion of recreation and fish and wildlife expenses in the operation and maintenance costs to be recovered by rates set under authority of 16 U.S.C. § 825s is unlawful, because that statute only allows recovery of 'the cost of producing and transmitting . . . electric energy.'"

At page 23 of their reply brief, Petitioners said:

"They [*i.e.*, Petitioners] filed a motion to produce documents and two extensive sets of interrogatories (the answers to which . . . showed that the rates unlawfully recovered recreation and fish and wildlife costs)." (Footnote omitted.)

(The interrogatories referred to asked:

("What percentage of the operating and maintenance costs assigned to power is actually used for recreation and fish and wildlife at the Narrows Dam project?")

(The Corps of Engineers, which operates Narrows Dam, answered:

("On a cumulative basis from FY 65 to FY 73, 4.49% of Operating and Maintenance costs assigned to Power was actually used for Recreation and Fish and Wildlife on the Narrows Dam Project.")

At oral argument, Petitioners' counsel raised the specific objection on three separate occasions. Tr. Or. Arg. 10-11, 14-15, 45.

Finally, in their petition for rehearing, Petitioners said at pages 7-8:

"Appellants also submitted interrogatories to the Corps of Engineers, the answers to which revealed, *inter alia*, that the rate for Narrows Dam recovers non-power costs. Answer to Question No. 33 of Plaintiff's Second Set of Interrogatories. This answer is prima facie evidence that the rate for Narrows Dam is unlawful under 16 U.S.C. § 825s, which, by its terms, allows only recovery of power costs." (Footnote omitted.)

In view of the number of times that Petitioners objected specifically to the inclusion of fish and wildlife and recreation costs in the Narrows Dam rate, Respondents' statement that the objection was not made is incomprehensible.

II. RE SUBMISSIONS AT THE AGENCY LEVEL

At pages 20-21 and 25-28 of their petition for certiorari, Petitioners set forth certain parts of the legislative history of the Administrative Procedure Act ("APA"). Petitioners believe this history shows unequivocally that Congress, when it enacted §§ 553(c) and 706(2)(F) of the APA, intended that, in rule-making cases where the statute does not require a trial-type hearing (i.e., in cases of informal rulemaking), disputed facts relevant to the validity of the rule would be tried in the district court. At page 13 of their brief in opposition, Respondents make the following statement:

"But the history to which petitioners refer (Pet. 20-21) concerns the situation where no agency hearing precedes the promulgation of a challenged rule. Here, however, the agency conducted an informal rulemaking investigation and received evidentiary submissions from petitioners as well as the Corps of Engineers. This hearing procedure is ample for informal rulemaking."

It is not clear whether Respondents have simply confused their usage of the term "hearing,"¹ or whether,

¹ The above-quoted passage from Respondents' brief uses the term "hearing" twice. The passage makes sense only if both uses of the term "hearing" refer to the same kind of procedure, i.e., either trial-type procedure or notice and comment procedure. However, the first sentence of the passage is correct only if "hearing"

by reference to so-called "evidentiary submissions," they mean to imply that the procedures afforded Petitioners were in excess of those normally associated with informal rulemaking.

What is clear is that, contrary to Respondents' statement, the agency received no submissions—evidentiary or otherwise—from the Corps of Engineers. In the case of Sam Rayburn Dam, the agency twice requested comments from the Corps,² but the order approving the rate increase stated:

"No comments or suggestions concerning SWPA's rate increase request were received by the Commission from the Corps of Engineers." (J.A. 949.)

Furthermore, the only submissions the agency received from Petitioners were comments questioning various aspects of the proposed rate increases. The

there refers to trial-type procedure (see excerpts from Senate and House Reports, Pet. 20-21, 25-28); and the reference to "hearing" in the last sentence presumably refers to notice and comment procedure, since informal rulemaking by definition does not involve trial-type procedures.

² On June 12, 1970, the Federal Power Commission's Bureau of Power wrote the Corps of Engineers asking for an explanation of the discrepancy between the Corps' costs shown in the Southwestern Power Administration's rate increase proposal and the Corps' costs shown in the Form No. 1 filed with the Commission by the Corps. J.A. 1059. On July 31, 1970, the Bureau of Power wrote the Corps again, asking for its response to the comments on the proposed rate increase filed by Petitioner Sam Rayburn Dam Electric Cooperative, Inc. J.A. 1008. Neither letter was answered by the Corps. J.A. 949.

agency approved the rate increases without responding to these comments.³

III. RE FORMAL FINDINGS OF FACT

Petitioners would also take this opportunity to point out a misstatement of their argument which appears in Respondents' brief at pages 10-11. There, Respondents state:

"Petitioners' contention (Pet. 18 [sic]) that formal findings should nonetheless be required in this case is not supported by *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971), on which they rely."

Contrary to this statement, what Petitioners contend—and what they cite *Overton Park* in support of—is that:

"The requirement that agency orders and rules evaluate relevant standards is not limited to cases where the enabling legislation requires formal findings of fact. See *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 408-09, 419-20 (1971)." (Pet. 17.)

Thus, Petitioners do not contend that formal findings should be required in this case; they contend that

³ Petitioners' comments are set forth at J.A. 170-72, 1002-07, 1020-26. The orders approving the rates without responding to the comments appear at J.A. 878, 945.

an evaluation of relevant standards should be required even though formal findings of fact are unnecessary.

Respectfully submitted,

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December 27, 1978

Certificate of Service

I hereby certify that on the 27th day of December 1978, I caused to be mailed a copy of the foregoing Reply Brief to each of the following individuals at the Department of Justice, Washington, D.C. 20530: (1) the Solicitor General of the United States; (2) Barbara Allen Babcock, Assistant Attorney General; (3) Leonard Schaitman, Attorney; and (4) Bruce G. Forrest, Attorney.

/s/ ROBERT F. PIETROWSKI, JR.
Robert F. Pietrowski, Jr.

Attorney for Petitioners

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**SOUTHWESTERN POWER ADMINISTRATION
AVERAGE RATE AND REPAYMENT STUDY
SAM RAYBURN DAM PROJECT**

APPENDIX F

**DECEMBER 1970
SUMMARY TABLE**

(1) Year of Study	(2) Fiscal Year	(3) Gross Revenue \$	(4) Corps O and M Expenses \$	(5) SPA Operating Expenses Purchased Power \$	(6) Service Charges \$	(7) All Other \$	(8) SPA Total \$	(9) Corps and SPA Interest \$	(10) Allocated For Depreciation and Repayment \$	(11) Net Rev. From Operations \$	(12) Downstream Benefits \$	(13) Amount Avail. For Principal/Int. \$	(14) Corps and SPA Interest \$	(15) Principal \$	(16) Beginning of Year \$	(17) POWER Added During Year \$	(18) INVESTMENT Balance To Be Repaid \$	(19) Accumulated Annual Investment \$	(20) Allowable Unpaid Balance \$	Fiscal Year
	A 1966		106,973	0	0			4,506	48,162	-159,641	0	-106,973	4,506	-111,479		22,639,862	22,751,341	22,639,862		1966
	C 1967	481,035	122,296			31,166	31,166	574,208	76,878	-323,513		327,573	574,208	-246,635	22,751,341	1,751,878	24,749,854	24,391,740		1967
	T 1968	558,334	141,199			69,215	69,215	614,146	81,814	-348,040		347,920	614,146	-266,226	24,749,854	14,484	25,030,564	24,406,224		1968
1	U 1969	950,004	153,368			66,156	66,156	616,623	84,571	29,286		730,480	616,623	113,857	25,030,564	34,865	24,951,572	24,441,089		1969
2	A 1970	950,004	165,038			68,199	68,199	614,786	86,704	15,277		716,767	614,786	101,981	24,951,572	8,410	24,858,001	24,449,499		1970
	L																			
SUB-TOTAL		2,939,377	688,874			234,736	234,736	2,424,269	378,129	-786,631		2,015,767	2,424,269	-408,502		24,449,499				
3	1971	950,000	149,800			64,606	64,606	583,502	200,969	-48,877		735,594	583,502	152,092	24,858,001	-1,601,500	23,104,409	22,848,000		1971
4	1972	1,030,000				58,988	58,988	557,593	205,993	57,626		821,212	557,593	263,619	23,104,409	0	22,840,790			1972
5	1973					53,768	53,768	550,876	211,143	64,413		826,432	550,876	275,556	22,840,790		22,565,234			1973
6	1974					51,518	51,518	543,932	216,422	68,328		828,682	543,932	284,750	22,565,234		22,280,484			1974
7	1975					51,407	51,407	536,510	221,832	70,151		828,793	536,810	291,983	22,280,484		21,988,501			1975
8	1976					49,664	49,664	529,469	227,378	73,689		830,536	529,469	301,067	21,988,501		21,687,434			1976
9	1977					49,569	49,569	521,939	233,062	75,630		830,631	521,939	308,692	21,687,434		21,378,742			1977
10	1978					46,134	46,134	514,139	238,889	81,038		834,066	514,139	319,927	21,378,742		21,058,815			1978
11	1979					46,050	46,050	506,138	244,861	83,151		834,150	506,138	328,012	21,058,815		20,730,803			1979
12	1980					45,980	45,980	497,936	250,983	85,301		834,220	497,936	336,284	20,730,803		20,394,519			1980
13	1981							489,529	257,257	87,434			489,529	344,691	20,394,519		20,049,828			1981
14	1982							481,314	263,689	89,217			481,314	352,906	20,049,828	16,500	19,713,422	22,864,500		1982
15	1983							472,502	270,281	91,437			472,502	361,718	19,713,422	0	19,351,704			1983
16	1984							463,459	277,038	93,723			463,459	370,761	19,351,704		18,980,943			1984
17	1985					45,894	45,894	454,188	283,964	96,154		834,306	454,188	380,118	18,980,943		18,600,825			1985
18	1986							444,685	291,063	98,558			444,685	389,621	18,600,825		18,211,204			1986
19	1987							435,529	298,340	100,437			435,529	398,777	18,211,204	24,000	17,836,427	22,888,500		1987
20	1988							425,575	305,798	102,933			425,575	408,731	17,836,427	0	17,427,696			1988
21	1989							415,356	313,443	105,507			415,356	418,950	17,427,696		17,008,746			1989
22	1990							404,883	321,279	108,144			404,883	429,423	17,008,746		16,579,323			1990
23	1991							394,147	329,311	110,848			394,147	440,159	16,579,323		16,139,164			1991
24	1992							383,891	337,544	112,871			383,891	450,415	16,139,164	30,700	15,719,449	22,919,200		1992
25	1993							372,650	345,983	115,673			372,650	461,656	15,719,449	0	15,257,793			1993
26	1994							361,109	354,632	118,565			361,109	473,197	15,257,793		14,784,596			1994
27	1995							349,279	363,498	121,529			349,279	485,027	14,784,596		14,299,569		22,848,000	1995
28	1996							337,153	372,585	124,568			337,153	497,153	14,299,569		13,802,416			1996
29	1997							325,126	381,900	127,280			325,126	509,180	13,802,416	16,500	13,309,736	22,935,700		1997
30	1998							312,407	391,447	130,452			312,407	521,899	13,309,736	0	12,787,837			1998
31	1999							299,360	401,234	133,712			299,360	534,946	12,787,837		12,252,891			1999
32	2000							285,986	411,264	137,056			285,986	548,320	12,252,891		11,704,571			2000
33	2001							272,278	421,546	140,482			272,278	562,028	11,704,571		11,142,543			2001
34	2002							268,017	432,085	134,204			268,017	566,289	11,142,543	401,600	10,977,854	23,337,300		2002
35	2003							254,110	442,887	137,309			254,110	580,196	10,977,854	0	10,397,658			2003
36	2004							239,605	453,959	140,742			239,605	594,701	10,397,658		9,802,957			2004
37	2005							224,738	465,308	144,260			224,738	609,568	9,802,957		9,193,389			2005
38	2006							209,499	476,941	147,866			209,499	624,807	9,193,389		8,568,582			2006
39	2007							197,540	488,864	147,902			197,540	636,766	8,568,582	150,200	8,082,016	23,487,500		2007
40	2008							181,714	501,086	151,506			181,714	652,592	8,082,016	0	7,429,424			2008
41	2009							165,400	513,613	155,293			165,400	668,906	7,429,424		6,760,518			2009
42	2010							148,677	526,453	159,176			148,677	685,629	6,760,518		6,074,889			2010
43	2011							131,536	539,615	163,155			131,536	702,770	6,074,889		5,372,119			2011
44	2012							114,145	553,105	167,056			114,145	720,161	5,372,119	7,300	4,659,258	23,494,800		2012
45	2013							96,145	566,933	171,228			96,145	738,161	4,659,258	0	3,921,097			2013
46	2014							77,691	581,106	175,509			77,691	756,615	3,921,097		3,164,482			2014
47	2015							58,776	595,634	179,896			58,776	775,530	3,164,482		2,388,952			2015
48	2016							39,388	610,524	184,394			39,388	794,918	2,388,952		1,594,034			2016
49	2017							20,388	625,788	188,130			20,388	813,918	1,594,034	35,800	815,916	23,530,600		2017
50	2018							62	641,432	192,812			62	834,244	815,916	0	-18,328		-1,558,224	2018
TOTALS		51,349,373	7,714,236	0	0	2,423,719	2,423,719	17,759,654	18,551,386	4,900,378	0	41,211,418	17,759,654	23,451,764		23,530,599				

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SOUTHWESTERN POWER ADMINISTRATION
AVERAGE RATE AND REPAYMENT STUDY
NARROWS DAM PROJECT

APPENDIX G

DECEMBER 1970
SUMMARY TABLE

(1) Year of Study	(2) Fiscal Year	(3) Gross Revenue \$	(4) Corps O and M Expenses \$	(5) Purchased Power \$	(6) SPA Operating Expenses Service Charges \$	(7) All Other \$	(8) SPA Total \$	(9) Corps and SPA Interest \$	(10) Allocated For Depreciation and Repayment \$	(11) Net Rev. From Operations \$	(12) Downstream Benefits \$	(13) Amount Avail. For Principal/Int. \$	(14) Corps and SPA Interest \$	(15) Principal \$	(16) POWER Beginning of Year \$	(17) Added During Year \$	(18) INVESTMENT Balance To Be Repaid \$	(19) Accumulated Annual Investment \$	(20) Allowable Unpaid Balance \$	Fiscal Year
	1950	3,823						-48		3,871	0	3,823	-48	3,871		5,496,130	5,492,259	5,496,130		1950
1	1951	166,266	122,751			10,283	10,283	136,891	90,370	-194,029		33,232	136,891	-103,659	5,492,259		5,595,918			1951
2	1952	233,382	128,467	34,366	4,872	36,817	76,055	139,537	90,370	-201,047		28,860	139,537	-110,677	5,595,918		5,706,595			1952
3	1953	310,364	115,524	106,096	12,000	48,394	166,490	142,311	88,532	-202,493		28,350	142,311	-113,961	5,706,595		5,820,556			1953
4	1954	321,535	109,616	117,564	12,000	13,317	142,881	144,651	89,624	-165,237		69,038	144,651	-75,613	5,820,556		5,896,169			1954
5	A 1955	331,621	114,409	128,586	12,000	19,751	160,337	146,693	89,766	-179,584		56,875	146,693	-89,818	5,896,169		5,985,987			1955
6	1956	331,439	92,648	129,819	12,000	4,868	146,687	148,498	91,704	-148,098		92,104	148,498	-56,394	5,985,987		6,042,381			1956
7	C 1957	333,219	91,393	129,095	12,000	8,648	149,743	149,909	91,691	-149,517		92,083	149,909	-57,826	6,042,381		6,100,207			1957
8	1958	358,328	104,494	125,866	12,000	9,302	147,168	151,172	91,354	-135,860		106,666	151,172	-44,506	6,100,207		6,144,713			1958
9	T 1959	364,451	126,673	128,686	12,000	5,963	146,649	152,479	90,369	-151,719		91,129	152,479	-61,350	6,144,713		6,206,063			1959
10	U 1960	363,584	112,024	127,856	12,000	6,101	145,957	153,832	90,369	-138,598		105,603	153,832	-48,229	6,206,063		6,254,292			1960
11	1961	365,692	141,078	42,132	3,367	45,695	91,194	154,689	90,369	-111,638		133,420	154,689	-21,269	6,254,292		6,275,561			1961
12	A 1962	331,731	126,444	32,000	4,532	17,414	53,946	154,997	90,369	-94,025		151,341	154,997	-3,656	6,275,561		6,279,217			1962
13	1963	309,040	127,869	0	0	18,516	18,516	154,820	90,894	-83,059		162,655	154,820	7,835	6,279,217	-1,030	6,270,352	5,495,100		1963
14	L 1964	300,000	134,156			16,464	16,464	154,681	89,393	-94,694		149,380	154,681	-5,301	6,270,352		6,275,653			1964
15	S 1965	300,112	134,043			14,560	14,560	154,204	81,362	-84,057		151,509	154,204	-2,695	6,275,653		6,278,348			1965
16	1966	300,000	135,659			10,987	10,987	154,367	-504,503	503,490		153,354	154,367	-1,013	6,278,348		6,279,361			1966
17	1967	300,000	129,208			19,705	19,705	155,232	-389,486	385,341		151,087	155,232	-4,145	6,279,361		6,283,506			1967
18	1968	300,000	133,855			16,163	16,163	155,250	33,045	-38,313		149,982	155,250	-5,268	6,283,506		6,288,774			1968
19	1969	300,000	155,835			14,461	14,461	155,622	33,871	-59,789		129,704	155,622	-25,918	6,288,774		6,314,692			1969
20	1970	345,328	164,978			16,790	16,790	190,141	40,577	-67,158		163,560	190,141	-26,581	6,314,692	1,666,926	8,008,199	7,162,026		1970
SUB-TOTAL		6,269,915	2,501,124	1,102,066	108,771	354,199	1,565,036	3,049,928	560,040	-1,406,213		2,203,755	3,049,928	-846,173		7,162,026				
21	1971	368,000	151,000			19,132	19,132	198,803	86,871	-87,806		197,868	198,803	-935	8,008,200	238,000	8,247,135	7,400,000		1971
22	1972	465,000				20,924	20,924	199,927	89,043	4,106		293,076	199,927	93,149	8,247,135	0	8,153,986			1972
23	1973					19,105	19,105	197,204	91,269	6,422		294,895	197,204	97,691	8,153,986		8,056,295			1973
24	1974					17,414	17,414	194,355	93,551	8,680		296,586	194,355	102,231	8,056,295		7,954,064			1974
25	1975					16,685	16,685	191,924	95,889	9,502		297,315	191,924	105,391	7,954,064	13,100	7,861,773	7,413,100		1975
26	1976					16,649	16,649	189,296	98,287	9,768		297,351	189,296	108,055	7,861,773	0	7,753,718			1976
27	1977					16,085	16,085	186,581	100,744	10,590		297,915	186,581	111,334	7,753,718		7,642,384			1977
28	1978					16,055	16,055	183,798	103,262	10,885		297,945	183,798	114,147	7,642,384		7,528,237			1978
29	1979					14,941	14,941	180,916	105,844	12,299		299,059	180,916	118,143	7,528,237		7,410,094			1979
30	1980					14,915	14,915	178,179	108,490	12,416		299,085	178,179	120,906	7,410,094	8,900	7,298,088	7,422,000		1980
31	1981					14,892	14,892	175,161	111,202	12,745		299,108	175,161	123,947	7,298,088	0	7,174,141			1981
32	1982							172,063	113,982	13,063			172,063	127,045	7,174,141		7,047,096			1982
33	1983							168,886	116,832	13,390			168,886	130,222	7,047,096		6,916,874			1983
34	1984							165,631	119,753	13,724			165,631	133,477	6,916,874		6,783,397			1984
35	1985							167,644	122,747	8,717			167,644	131,464	6,783,397	219,500	6,871,433	7,641,500		1985
36	1986					14,864	14,864	166,586	125,815	6,735		299,136	166,586	132,550	6,871,433	0	6,738,883			1986
37	1987							161,181	128,961	8,994			161,181	137,955	6,738,883		6,600,928			1987
38	1988							157,732	132,185	9,219			157,732	141,404	6,600,928		6,459,524			1988
39	1989							154,197	135,489	9,450			154,197	144,939	6,459,524		6,314,585			1989
40	1990							153,277	138,876	6,983			153,277	145,859	6,314,585	110,900	6,279,626	7,752,400		1990
41	1991							149,700	142,348	7,088			149,700	149,436	6,279,626	0	6,130,190			1991
42	1992							145,964	145,907	7,265			145,964	153,172	6,130,190		5,977,018			1992
43	1993							142,134	149,555	7,447			142,134	157,002	5,977,018		5,820,016			1993
44	1994							138,209	153,294	7,633			138,209	160,927	5,820,016		5,659,089			1994
45	1995							134,525	157,126	7,485			134,525	164,611	5,659,089	13,900	5,508,378	7,766,300	7,413,100	1995
46	1996							130,418	161,054	7,664			130,418	168,718	5,508,378	0	5,339,660			1996
47	1997							126,201	165,080	7,855			126,201	172,935	5,339,660		5,166,725			1997
48	1998							121,877	169,207	8,052			121,877	177,259	5,166,725		4,989,466			1998
49	1999							117,446	173,438	8,252			117,446	181,690	4,989,466		4,807,776			1999
50	2000							115,621	177,774	5,741			115,621	183,515	4,807,776	111,500	4,735,761	7,877,800		2000
51	2001							111,103	182,218	5,815			111,103	188,033	4,735,761	0	4,547,728			2001
52	2002							106,402	186,773	5,961			106,402	192,734	4,547,728		4,354,994			2002
53	2003							101,584	191,443	6,109			101,584	197,552	4,354,994		4,157,442			2003
54	2004							96,645	196,229	6,262			96,645	202,491	4,157,442		3,954,951			2004
55	2005							92,736	201,135	5,265			92,736	206,400	3,954,951	47,300	3,795,851	7,925,100		2005
56	2006							87,605	206,163	5,368			87,605	211,531	3,795,851	0	3,584,320			2006
57	2007							82,317	211,317	5,502			82,317	216,819	3,584,320		3,367,501			2007
58	2008							76,897	216,600	5,639			76,897	222,239	3,367,501		3,145,262			2008
59	2009							71,341	222,015	5,780			71,341	227,795	3,145,262		2,917,467			2009
60	2010							68,276	227,565	3,295			68,276	230,860	2,917,467	107,900	2,794,507	8,033,000		2010
61	2011							62,572	233,254	3,310			62,572	236,564	2,794,507	0	2,557,943			2011
62	2012							56,658	239,086	3,392			56,658	242,478	2,557,943		2,315,465			201